

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 22, 2008

STATE OF TENNESSEE v. FAITH RENEA IRWIN GIBSON

Direct Appeal from the Criminal Court for Sullivan County
Nos. S50,419; S52,896 R. Jerry Beck, Judge

No. E2007-01990-CCA-R3-CD - Filed April 17, 2009

Defendant, Faith Renea Irwin Gibson, appeals the trial court's denial of her request for judicial diversion. After a thorough review of the record, we reverse the judgment of the trial court and remand for further consideration.

**Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Criminal Court Reversed and Remanded**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Whitney P. Taylor, Kingsport, Tennessee, for the appellant, Faith Renea Irwin Gibson.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and James F. Goodwin, Jr., Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

In case no. S50,419, Defendant was indicted in count one for especially aggravated kidnapping, a Class A felony, and in count two for theft of property valued at under \$500, a Class A misdemeanor. In case no. S52,896, the State and Defendant agreed to proceed by information upon a charge of custodial interference, a Class E felony. Thereafter, Defendant entered into a negotiated plea agreement in which Defendant agreed to enter best interest pleas of guilty in case no. S50,419, to the charged offense of theft in count two, and in case no. S52,896, to the charged offense of custodial interference. In exchange, the State agreed to enter a nolle prosequi as to count one of the indictment in case no. S50,419 charging Defendant with especially aggravated kidnapping.

According to the plea agreement, Defendant was to be sentenced as a Range I, standard offender, to concurrent sentences of one year for the custodial interference conviction, and eleven months, twenty-nine days for the theft conviction, for an effective sentence of one year. The manner of service of Defendant's sentences, including her request for judicial diversion, was left to the trial court's determination.

At the guilty plea submission hearing, the State provided the following factual basis in support of Defendant's pleas of guilty:

[t]hat on or about July 30, 2004, at approximately 1500 hours, the Defendant, Faith Renea Gibson, who is the biological mother of Chelsea Grace Boggs, along with her boyfriend, Richard Keith Boggs, who is the biological father of the same child, came to the residence of Patrick and Connie MacIntosh at 1417 Valley Street in Kingsport for a visit with the seven-month-old daughter, Chelsea. The child was at that time in State's custody and had been since birth due to the fact that the child was born drug-addicted. The MacIntoshes' are the maternal aunt and uncle, and were serving at that time as foster parents for the child.

Mr. Boggs and [Defendant] had scheduled visitation with the child, but did not have court permission to remove the child from the home or have any type of unsupervised visitation per the court order issued by Sullivan County Juvenile Court. [Defendant] and Mr. Boggs were fully aware, on July 30, 2004, of the conditions of this order.

On . . . July 30, 2004, [Defendant] had come to the home to exercise [the] court-ordered supervised visitation. Mr. Boggs waited outside in the vehicle. During the visitation Mr. MacIntosh stepped out of the livingroom momentarily to fix a bottle for the child. While Mr. MacIntosh was in the kitchen[, Defendant] took two cell phones belonging to the MacIntoshes and fled the residence with the child.

Once outside [Defendant] placed the child in a black BMW 740 that was driven by Mr. Boggs. They left the area and could not be located. As a result of the only means of communication being removed from the home by [Defendant], Mr. MacIntosh was forced to drive to the DCS office to report the incident, which gave Mr. Boggs and [Defendant] additional time to flee the area before authorities could be alerted.

Several hours later[, Mr. Boggs, [Defendant], and the child were located at [Defendant]'s mother's residence in Scott County, Virginia. They were then taken into custody and the child was returned to DCS in Sullivan County.

Valley Street is located in the city limits of Kingsport, Sullivan County. And the State would have also offered as proof with regard to the information that at least

since January of 2006 that . . . Mr. Boggs and [Defendant] have been living in the Scott County, Virginia area continuously since that time.

Defendant requested judicial diversion at the guilty plea submission hearing, and the trial court deferred entering judgments of conviction until determination of Defendant's request at a separate sentencing hearing.

At the hearing on Defendant's request for judicial diversion, the trial court first noted that Defendant was a qualified candidate for judicial diversion. Defendant did not testify on her own behalf at the hearing and did not present any witnesses who could testify favorably as to Defendant's qualifications for judicial diversion. Instead, Defendant relied on the presentence report which was introduced as an exhibit at the hearing in support of her request.

According to the presentence report, Defendant was forty-one years old at the time of the sentencing hearing. She was born in Homestead, Florida, and the family moved to the tri-cities area in Tennessee when she was a baby. The family returned to Florida when Defendant was eleven years old. Defendant attended Homestead High School but left school after completion of the eleventh grade. Defendant reported that she received good grades while in school, and her attendance record was "average." Defendant returned to the tri-cities area when she was eighteen years old. She married Marty Gibson when she was twenty-five years old, but the marriage ended in divorce after thirteen years. The couple had no children.

Defendant stated in the sentencing report that she was currently in a relationship with Richard Boggs. The couples's daughter, Chelsea Boggs, was born on December 21, 2003. According to the presentence report, Defendant's daughter was removed from Defendant's custody after her birth because drugs were detected in the infant's system.

Defendant stated in the presentence report that she suffers from lower back and leg pain resulting from a series of accidents. Defendant said that she was hit by a truck and sustained significant injuries to her feet. Defendant also broke her pelvis in a car accident. She later reinjured her foot and eight screws and a metal plate were inserted into her right ankle. Defendant reported that she was currently taking the prescription medicines oxycodone, alprozolam, and fluoxetine.

Defendant stated that she has not been able to work since 1999 due to health reasons. Defendant stated that she was last employed by Cherokee Rental in Kingsport. Defendant supervised the finance department from 1992 until 1999 when she went on medical leave. From 1989 until 1992, Defendant was a regional director trainer for Formu-3 Weight Loss. Defendant was employed by All Weather as a line worker from the fall of 1984, until the winter of 1985, when she was hit by a truck in the company's parking lot.

Defendant reported one traffic offense in 1993, and has no other criminal history. Defendant said that she occasionally uses alcohol but has not done so for some time. Defendant acknowledged

that she had used cocaine and marijuana in the past, but she stated in the presentence report that she has not used drugs “in years.”

Defendant chose not to give a statement concerning the criminal acts to the probation officer at the time that the presentence report was prepared. The presentence report, however, contained the statement Defendant made to the investigating police officers after her arrest as follows:

At around 1430 hours, I went for my regularly scheduled visit with my daughter[,] Chelsea Boggs[,] at my sister’s house on Valley St[reet]. I went inside while Rick waited outside in the car. I went inside and began to talk with my brother-in-law, Patrick. I noticed that Chelsea had stopped talking, had glazed eyes, and she was chewing on her fist like she was hungry. Her head was crooked to the side and she had hives on the back of her neck. I tried to get her attention by picking her up and talking to her but she would not respond to me. I decided at that point [that] I needed to take her to the doctor. I could not go to Wellmont because of problems I have had with them in the past. I wanted to take Chelsea to the hospital[,] to any other hospital besides Wellmont to get her checked. Patrick left the room and I walked out the door with Chelsea. I had told Patrick that I was going to the door to show the baby to Rick. I got in the car with Rick[,] and we drove straight to my mom’s in Virginia. We fed the baby cereal and [two eight-ounce] bottles. I left to go get cigarettes and I was coming back so that Rick and I could take the baby to the hospital. When I got back to my mom’s house and the police were there and arrested [me]. I knew what I did was wrong but I just wanted to get her some help.

At the sentencing hearing, the State argued that Defendant’s role as a leader in the commission of the offense as well as her refusal to give a statement to the probation officer reflected unfavorably on her request for judicial diversion. Defendant responded that the presentence report had been prepared prior to the entry of a guilty plea, and that she had been advised by her trial counsel not to give a statement during the preparation of the presentence report. Defendant’s statement to the police following her arrest, however, was included. Defendant also submitted that her lack of criminal history, her employment record, her current medical condition, and her age were factors favorable to diversion.

At the conclusion of the sentencing hearing, the trial court acknowledged that the presentence report was prepared prior to the entry of Defendant’s plea of guilty. The trial court noted, however, that considerable time had passed since the guilty plea submission hearing, during which time Defendant had not spoken with her probation officer. The trial court observed that the information provided to a probation officer can provide factors beyond the circumstances of the offense which are relevant considerations in determining whether to grant or deny diversion. The trial court stated, “I’ve got a blank because she didn’t say anything.” The trial court denied Defendant’s request for judicial diversion stating:

I'm not going to fault her for not giving a statement originally because we did a pre-plea investigation. But certainly after the pleas were entered it could have been offering her no harm and may have offered the Court benefits [sic] of information that are not available to me. So the – basically two negative factors: prior use of cocaine. And I don't consider that real strong because I like people to self-report. That way it gives the Court an opportunity to address problems. But my reason, just to make it narrow if the case goes up on appeal, for denying judicial diversion is that under State v. Baxter, [868 S.W.2d 679 (Tenn. Crim. App. 1993),] I feel like I've missed something I might need in a diversion case.

The trial court imposed the agreed upon sentences of one year for the custodial interference conviction, and eleven months, twenty-nine days for the misdemeanor theft conviction. The trial court suspended the sentences and placed Defendant on probation.

II. Denial of Judicial Diversion

On appeal, Defendant argues that the trial court abused its discretion in denying her request for judicial diversion because it failed to consider all of the appropriate criteria in making its determination. Specifically, Defendant contends that the trial court failed to consider her amenability to rehabilitation as reflected by her lack of a criminal history, and her physical disabilities which make it unlikely that she will commit any future crimes. Defendant submits that the trial court also did not consider the circumstances of the offense which show that the custodial interference offense was not committed by fraud, deceit or violence, and that the child did not suffer any harm. Defendant argues that she disclosed sufficient information in the presentence report concerning her education, work history, medical and mental health status, and social history to support a grant of judicial diversion.

With certain statutory exceptions, a defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. See T.C.A. § 40-35-313(a)(1)(B). Judicial diversion allows the trial court to defer further proceedings without entering a judgment of guilt and to place the defendant on probation under reasonable conditions. Id. When the probationary period expires, if the defendant has completed probation successfully, then the trial court will discharge the defendant and dismiss the prosecution with no adjudication of guilt. See id. at (a)(2). The defendant may then apply to have all records of the proceedings expunged from the official records. See id. at (b). A person granted judicial diversion is not convicted of an offense because a judgment of guilt is never entered. See id. at (a)(1)(A).

Judicial diversion is not a sentencing alternative for a defendant convicted of an offense. See id. § 40-35-104(c). Therefore, those who are statutorily eligible are not presumptively entitled to diversion; rather, it is extraordinary relief for which the defendant bears the burden of proof. State v. Curry, 988 S.W.2d 153, 157 (Tenn. 1999); State v. Baxter, 868 S.W.2d 679, 681 (Tenn. Crim. App. 1993). Because the decision to grant judicial diversion lies within the sound discretion of the

trial court, this court will not disturb that decision on appeal absent an abuse of discretion. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). An abuse of discretion exists if the record contains no substantial evidence to support the denial. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983).

In determining whether to grant judicial diversion, the trial court must consider (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. Electroplating, 990 S.W.2d at 229 (citing State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996); Bonestel, 871 S.W.2d at 168). In addition, "the record must reflect that the court has weighed all of the factors in reaching its determination." Electroplating, 990 S.W.2d at 229. If the trial court refuses to grant judicial diversion, it should state on the record "the specific reasons for its determinations." Parker, 932 S.W.2d at 958-59. If the trial court "based its determination on only some of the factors, it must explain why these factors outweigh the others." Electroplating, 990 S.W.2d at 229. We also note that "Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion." State v. Cutshaw, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997).

The State acknowledges on appeal that the trial court did not explain on the record those factors supporting a denial of diversion and how those factors outweighed others favorable to a grant of diversion. Relying on State v. Baxter, 868 S.W.2d 679 (Tenn. Crim. App. 1993), a pretrial diversion case, the State argues, however, that Defendant failed to meet her initial burden of presenting adequate information in support of her request which would enable the trial court to make a decision as to judicial diversion.

In Baxter, co-defendants, Brian Keith Baxter and his wife, Lisa Baxter, filed applications for pre-trial diversion after being charged with one count of possession of marijuana with intent to sell and one count of possession of marijuana with intent to deliver. Baxter, 868 S.W.2d at 680. In his application, Mr. Baxter provided "his birth date; his place of last employment; his prior criminal record [consisting of two DUI convictions and one juvenile adjudication for breaking and entering]; his marital status; and the fact that he has two children, ages six and three." The application stated that Mr. Baxter had no problems "other than drinking, since he was a juvenile." Id. The prosecutor's denial of Mr. Baxter's request for pre-trial diversion was based on "the need for deterrence of those similarly situated in the community to Mr. Baxter regarding illegal drug-type offenses and the quantity of marijuana possessed by [the defendant] [2 3/4 pounds] is indicative of an ongoing scheme to [sell] marijuana." Id.

Ms. Baxter's application for pretrial diversion contained even less information than her husband's and simply stated that she met "the statutory requirements." Id. In response to Ms. Baxter's application, the district attorney general succinctly replied that the application for pretrial diversion "is hereby denied." Id.

On appeal by writ of certiorari, the trial court affirmed the prosecutor's decision, and the co-defendants sought review pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. After noting that pre-trial diversion is "extraordinary relief," this Court stressed that the defendant carries the burden of "providing the prosecuting attorney with sufficient background information and data to enable the prosecutor to make a reasoned decision as to the relief sought." Id. at 681. We concluded that neither defendant "presented the prosecutor with a proper application," and both defendants "failed to meet the burden required by law which would trigger more than a conclusory response by the district attorney general." Id. As for Ms. Baxter, this Court found no abuse of discretion in the trial court's denial of pre-trial diversion based on Ms. Baxter's failure to meet her initial burden of providing any information at all in support of her request for pretrial diversion. As for Mr. Baxter, this Court was of the view "that he simply did not make a worthy candidate," based on the limited information he chose to provide in support of his request for judicial diversion. Id.

As we cautioned in Baxter,

[a] good application for pretrial diversion should contain information concerning the circumstances of the offense, which was not done in the present case; the defendant's prior criminal history; and all of the other information that was outlined in State v. Hammersley. [650 S.W.2d 352, 355 (Tenn. 1983)]. If a defendant considers himself or herself a candidate, the applicant should put the best foot forward. A defendant would be wise to submit affidavits, letters, and any other positive information to convince the prosecutor that the eligible candidate is worthy of this extraordinary, discretionary relief. If the input to the prosecutor is minimal, then the response will be the same.

Baxter, 868 S.W.2d at 681.

In the case sub judice, Defendant chose to rely on the information contained within her presentence report to support her request for judicial diversion. Defendant did not testify at the sentencing hearing and did not present any witnesses who might testify favorably as to her suitability for judicial diversion. Nor did defendant supplement the information previously provided to the probation officer prior to the submission of her guilty plea. Nonetheless, unlike the situation presented in State v. Baxter, the information contained within the presentence report, although minimal at times, addressed the considerations outlined in Electroplating. That is, Defendant presented her amenability to correction, her criminal record and social history, the status of her present physical and mental health, and the circumstances of the offense as reflected in her statement to the police following her arrest. See Electroplating, 990 S.W.2d at 229.

Accordingly, we conclude that the trial court erred in denying Defendant's request for judicial diversion on the trial court's stated narrow ground that Defendant did not provide a statement concerning the circumstances surrounding the charged offenses. Based on our review, we conclude that Defendant, while arguably not "put[ting] her best foot forward," met her initial burden overall of presenting information upon which the trial court could make appropriate findings of fact and conclusions of law. Accordingly, we reverse and remand this matter to the trial court for another

hearing and for the trial court to make the required findings on the record as to the application for judicial diversion based on the information presented by Defendant.

CONCLUSION

After review, we reverse the trial court's judgment and remand the matter to the trial court for further proceedings consistent with this opinion.

THOMAS T. WOODALL, JUDGE